

Name: Sean Cunniff

JUDICIAL SELECTION COMMISSION

Application for Judicial Vacancy on the First Judicial District

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APPLICATION

PERSONAL

1. Full Name	Sean Michael Cunniff			
2. County of Residence	Santa Fe			
3. Birthplace	Claremont, New Hampshire			
4. If born outside the US, give the basis for your citizenship				
5. Birth Date		1972		
6. Marital Status	Married			
7. If married, list spouse's full name	Tania Shahani			
8. Spouse's occupation	Attorney (Assistant Appellate Public Defender)			
9. Do you have any other familial relationships that might present conflicts if you were to be seated as a judge? If so, please explain these relationships and how you would address any conflicts.				
Answer 9: No.				
10. List all places of residence, city and state, and approximate dates for the last 10 years				
Date(s) of Residence	Street Address	City	State	Zip
5/2013 – Present	936 Dunlap Street	Santa Fe	NM	87501
5/2012 – 5/2013	663 Bishops Lodge Rd., Unit 3	Santa Fe	NM	87501
10/2011 – 5/2012	3833 North 30 th Street, #310	Phoenix	AZ	85016
9/2010 – 10/2011	663 Bishops Lodge Rd., Unit 3	Santa Fe	NM	87501
10/2009 – 9/2010	510 Bryn Mawr Dr., SE	Albuquerque	NM	87106
8/2009 – 10/2009	8604 Avenales Ave., NE	Albuquerque	NM	87111
6/2009 – 8/2009	4303 East Cactus Rd., #229	Phoenix	AZ	85032
5/2007 – 6/2009	210 Richmond Drive, SE	Albuquerque	NM	87106

EDUCATION

11. List schools attended with dates and degrees (including all post-graduate work)	
High School(s)	Fall Mountain Regional High School, 10/1986 – 6/1990, Diploma
College(s)	University of Illinois, Urbana-Champaign, 8/1990 – 12/1993, No degree University of New Mexico, 1/2005 - 12/2006, Bachelor of Arts
Law School(s)	University of New Mexico, 8/2007 – 5/2010, Juris Doctor
12. Bar Admissions and Dates	
New Mexico, September 2010	

EMPLOYMENT

13. List Your Present Employment	
Date(s) of Employment	May 2012 – Present
Employer	Office of the New Mexico Attorney General
Mailing Address	P.O. Drawer 1508, Santa Fe, NM, 87504
Business Phone	505-490-4060
Position	Assistant Attorney General
Duties	<u>Civil Litigation:</u> I currently serve as qui tam counsel to the State of New Mexico, prosecuting actions brought under the New Mexico Fraud Against Taxpayers Act and the federal False Claims Act. I am responsible for all aspects and phases (including appeals) of the cases assigned to me. <u>Counsel to State Agencies:</u> Previously I served as counsel to a variety of State boards and commissions. In this role, I was responsible for providing counsel services on a broad range of topics (such as rulemaking and sunshine law compliance) and representing my clients in litigation. <u>Administrative Prosecution:</u> I have served as an administrative prosecutor to numerous State licensing bodies. In this role, I have prosecuted many professional licensees before administrative tribunals.
Supervisor	Currently, Regina Ryanczak
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Oct. 2011 – May 2012 & Summers of 2008 and 2009
Employer	Quarles & Brady LLP
Mailing Address	2 North Central Avenue, Phoenix, AZ 85004
Business Phone	602-229-5200
Business FAX	602-229-5690
Employer's Email Address	Lori.Winkelman@quarles.com
Position	Associate Attorney
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Sep. 2010 – Sep. 2011
Employer	New Mexico Supreme Court
Mailing Address	237 Don Gaspar Avenue, Santa Fe, NM 87501
Business Phone	505-827-4860
Business FAX	505-827-4837
Employer's Email Address	nmsupremecourtclerk@nmcourts.gov
Position	Term Judicial Clerk to Justice Edward L. Chavez
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	July 2010 – August 2010
Employer	Lubin & Enoch PC
Mailing Address	349 North 4 th Avenue, Phoenix, AZ 85003
Business Phone	602-234-0008
Business FAX	602-626-3586
Employer's Email Address	nick@lubinandenoch.com
Position	Temporary Law Clerk (between bar exam and clerkship)
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Sep. 2008 – July 2010

Employer	Foster, Rieder & Jackson PC
Mailing Address	201 3 rd Street, NW, Suite 1500, Albuquerque, NM 87102
Business Phone	505-767-0577
Business FAX	505-242-9944
Employer's Email Address	travis@frjlaw.com
Position	Part Time Law Clerk During 2L and 3L Years at UNM Law School
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	July 2007 – August 2007
Employer	Prewitt Organizing Fund (now defunct)
Mailing Address	1326 18 th Street NW, Washington, DC 20036
Business Phone	202-223-2528
Business FAX	
Employer's Email Address	
Position	Researcher
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Jan. 2007 – July 2007
Employer	Indian Affairs Department, State of New Mexico
Mailing Address	1220 South St. Francis Drive, Santa Fe, NM 87505
Business Phone	505-476-1600
Business FAX	505-476-1601
Employer's Email Address	
Position	Legislative and Policy Analyst (hired for the 2007 legislative session)
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	January 2005 – December 2006
Employer	Institute for Public Policy – University of New Mexico (now defunct)
Mailing Address	1805 Sigma Chi Rd., NE, Albuquerque, NM
Business Phone	505-277-1099
Business FAX	505-277-3115
Employer's Email Address	
Position	Researcher
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Jan. 2003 – August 2004
Employer	International Brotherhood of Electrical Workers, Local 611
Mailing Address	4921 Alexander Blvd., NE, Albuquerque, NM 87107
Business Phone	505-343-0611
Business FAX	505-342-2990
Employer's Email Address	carlcondit@ibew611.org
Position	Assistant Business Manager
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	June 2000 – Jan. 2003
Employer	International Brotherhood of Electrical Workers (7 th District)
Mailing Address	320 Westway Place, Suite 531, Arlington, TX 76018
Business Phone	817-557-1611
Business FAX	817-557-4801

Employer's Email Address	ivpd_7@ibew.org
Position	Organizer/Researcher
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Oct. 1998 – June 2000, Oct. 1995 – Nov. 1996, May 1994 – Oct. 1995
Employer	AFL-CIO
Mailing Address	815 16 th Street, NW, Washington, DC
Business Phone	202-637-5000
Business FAX	
Employer's Email Address	
Position	Research/Organizing Union Campaign Staff
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Sept. 1997 – Oct. 1998
Employer	American Federation of State, County and Municipal Employees (AFSCME) Council 31
Mailing Address	205 North Michigan Avenue, Suite 2100, Chicago, IL 60601
Business Phone	312-641-6060
Business FAX	312-861-0979
Employer's Email Address	
Position	Research Coordinator
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Nov. 1996 – May 1997
Employer	Service Employees International Union (SEIU), Local 25 (now Local 1)
Mailing Address	111 East Wacker Drive, Suite 1700, Chicago, IL 60601
Business Phone	312-233-8880
Business FAX	
Employer's Email Address	
Position	Researcher
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	Summers of 1991, 1992 and 1993
Employer	Specialty Paperboard, Inc. (now FiberMark, Inc.) (f/k/a Boise Cascade)
Mailing Address	161 Wellington Road, Brattleboro, VT 05302
Business Phone	802-257-0365
Business FAX	802-257-5900
Employer's Email Address	
Position	Utility Operator - Laborer on paperboard production machine
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	August 1992 – December 1993
Employer	Illini Media, Inc. d/b/a The Daily Illini
Mailing Address	512 East Green Street, Champaign, IL 61820
Business Phone	217-337-8300
Business FAX	
Employer's Email Address	news@dailyillini.com
Position	Weekly opinion columnist

14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	August 1988 – August 1990
Employer	Holmes Farm
Mailing Address	55 Ball Hill Rd., Langdon, NH 03602
Business Phone	603-835-6832 (barn)
Business FAX	603-445-7033
Employer's Email Address	holmesfarmnh@comcast.net
Position	Laborer/Herdsmen
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	August 1986 – August 1988
Employer	Big C Ranch (defunct)
Mailing Address	Ball Hill Rd., Langdon, NH 03602
Business Phone	
Business FAX	
Employer's Email Address	
Position	Laborer
14. List Your Previous Employment (beginning with most recent)	
Dates of Employment	October 1984 – August 1986
Employer	George Benton Porter (deceased – enterprise defunct)
Mailing Address	Walker Hill Rd., Langdon, NH 03602
Business Phone	
Business FAX	
Employer's Email Address	
Position	Laborer/Assistant on tree farm and land surveying enterprise

Note: No. 14 is a separate table which enables you to copy and paste it as many times as necessary to list all previous employers.

PARTNERS AND ASSOCIATES

15. List all partners and associates, beginning with the current or most recent:
<p>Answer 15: I am currently in practice as a government attorney, which gives rise to no law firm relationships. Since being licensed, I have practiced at just one law firm, in the Phoenix office of Milwaukee-based Quarles & Brady, LLP, where my practice was exclusively in the federal bankruptcy court in the District of Arizona. At the time, Quarles employed approximately 150 lawyers in Arizona and more than 400 nationwide.</p> <p>During my tenure at Quarles, there were two firm attorneys (aside from myself) licensed in New Mexico, Eric B. Johnson and Brenda M. Maloney Shafer. As I recall, the other attorneys in my practice group were associates Jason Curry, Anthony Cali, Kelly E. Singer, James Ugalde, Walter Ashbrook, Elizabeth Fella and Isaac Gabriel; and partners John S. Craiger, James A. Harris, Lori Winkelman, Scott A. Klundt, Mary Ann Welsh and Brian Sirower. I have asked the firm for a full list of attorneys who were employed there during my tenure in 2011-2012.</p>

EXPERIENCE

16. How extensive is your experience in Personal Injury Law?

Answer 16: During my summer clerkships at Quarles & Brady LLP (summers of 2008 and 2009), I was assigned to the civil litigation department, where I worked on defending a variety of personal injury actions. As a summer associate, my role was largely restricted to drafting and researching.

17. How extensive is your experience in Commercial Law?

Answer 17: The vast majority of my current practice (about 90%) is complex civil litigation, typically involving commercial defendants. I have served as lead counsel on a multitude of high-value commercial litigation matters, often involving complex legal issues and procedure. As a result, I have an extensive background in conducting discovery and in discovery disputes, wide-ranging motion practice experience, and have conducted many evidentiary proceedings.

18. How extensive is your experience in Domestic Relations Law?

Answer 18: My primary experience came as a law student working in the Southwest Indian Law Clinic at the UNM School of Law. In that role, I was responsible for multiple domestic relations matters, including handling a divorce. Additional experience in this practice area came working as a clerk at Foster, Rieder & Jackson during law school, where I worked on matters in a divorce proceeding.

19. How extensive is your experience in Juvenile Law?

Answer 19: No experience.

20. How extensive is your experience in Criminal Law?

Answer 20: My experience in criminal law came early in my legal career. While I was a student at the UNM School of Law, I served as a criminal law teaching assistant for Professor Elizabeth Rapaport and participated in the law school's "criminal law and practice program." With regard to the latter, I was assigned to the 2nd Judicial District District Attorney's Office for one semester, where I assisted prosecutors in gang-related prosecutions. During my judicial clerkship with Justice Chavez, I worked primarily on criminal law matters, drafting and researching numerous opinions in criminal appeals.

21. How extensive is your experience in Appellate Law?

Answer 21: I have handled (served as lead counsel) on approximately seven appellate matters in State the state appellate courts. Six of these matters were before the Supreme Court, including some high-profile disputes, such as Griego v. Oliver, 2014-NMSC-003, which decided the question of the legality of same-sex marriage under State law. Through this work, I have argued before the Supreme Court on multiple occasions, and drafted numerous appellate briefs.

Also, under Rules of Civil Procedure 1-074 and 1-075, I have handled numerous appeals of administrative actions to the district courts, including appeals of actions against professional licensees and challenges to agency rulemaking activity.

Finally, I worked as a term judicial clerk in the chambers of Justice Edward L. Chavez during my first year of practice.

22. How many cases have you tried to a jury? Of those trials, how many occurred within the last two years? Please indicate whether these jury trials involved criminal or civil cases.

Answer 22: None of my matters have been decided in jury trials.

23. How many cases have you tried without a jury? How many of these trials occurred within the last two years? Please indicate whether these non-jury trials involved criminal or civil cases.

Answer 23: None, but I have served as lead counsel on a number of lengthy evidentiary hearings in my current role as an Assistant Attorney General. Included are multi-day hearings involving complex legal issues, many parties, examination of witnesses (lay and expert), and voluminous exhibits. Many of these

matters are high profile and involve substantial sums of money.

I have also administratively prosecuted more than 50 matters, most of which involved evidentiary hearings before an administrative law judge. In these proceedings, I was responsible for putting on (and defending) the State's case, including the introduction of exhibits through lay and expert witnesses.

All of these proceedings were civil matters. Within the last two years, I have conducted approximately a half-dozen evidentiary proceedings.

24. How many appeals have you handled? Please indicate how many of these appeals occurred within the last two years.

Answer 24: No fewer than seven, as described above, in addition to another half dozen administrative appeals in district court. Approximately three have occurred in the last two years. I currently have one active matter, pending before the Court of Appeals.

PUBLIC OFFICES/PROFESSIONAL & CIVIC ORGANIZATIONS

25. Public Offices Held and Dates

Public Office	Dates
None.	

26. Activities in professional organizations, including offices, held, for last 10 years

Professional Organization	Position Held	Dates
N.M. Bar Assn. – Public Law Section	Member of the Board Section Chair	Jan. 2014 – Current Jan. 2016 – Jan. 2017

27. Activities in civic organizations, including offices, held, for last 10 years

Civic Organization	Position Held	Dates

28. Avocational interests and hobbies

Answer 28: Outdoor recreation. Politics. Reading.

29. Have you been addicted to the use of any substance that would affect your ability to perform the essential duties of a judge? If so, please state the substance and what treatment received, if any.

Answer 29: No.

30. Do you have any mental or physical impairment that would affect your ability to perform the essential duties of a judge? If so, please specify

Answer 30: No.

31. To your knowledge, have you ever been disciplined for violation of any rules of professional conduct in any jurisdiction? In particular, have you ever received any discipline, formal or informal, including an "Informal Admonition." If so, when, and please explain.

Answer 31: No.

32. Have you ever been convicted of any misdemeanor or felony other than a minor traffic offense?

Answer 32: No.

33. Have you ever had a DWI or any criminal charge, other than a minor traffic offense, filed against you? If so, when? What was the outcome?

Answer 33: No.

34. Have you ever been a named party in any lawsuit in either your personal or professional capacity? If so, please explain the nature of the lawsuit(s) and the result(s).

Answer 34: Yes, once, Capital One Bank v. Cunniff, no. D-202-cv-2006-08728. The lawsuit was brought to collect money owed. The matter was settled, and the parties stipulated to dismissal, which was granted.

35. To your knowledge, is there any circumstance in your professional or personal life that creates a substantial question as to your qualifications to serve in the judicial position involved or which might interfere with your ability to so serve?

Answer 35: No.

36. If you have served as a judge in New Mexico, have you ever been the subject of charges of a violation of the Code of Judicial Conduct for which a public filing has occurred in the New Mexico Supreme Court, and if so, how was it resolved?

Answer 36: Not applicable.

37. If you have served as a judge in New Mexico, have you ever participated in a Judicial Performance Evaluation, including interim, and if so, what were the results?

Answer 37: Not applicable.

38. Have you filed all federal, state and city tax returns that are now due or overdue, and are all tax payments up to date? If no, please explain.

Answer 38: Yes.

39. Have you or any entity in which you have or had an interest ever filed a petition in bankruptcy, or has a petition in bankruptcy been filed against you? If so, please explain.

Answer 39: No.

40. Are you presently an officer, director, partner, majority shareholder or holder of a substantial interest in any corporation, partnership or other business entity? If so, please list the entity and your relationship:

Answer 40: No.

41. Do you foresee any conflicts under the NM Code of Judicial Conduct that might arise regularly? If so, please explain how you would address these conflicts.

Answer 41: No.

42. Do you meet the constitutional qualifications for age, residency, and years of practice for the judicial office for which you are applying? Please explain.

Answer 42: Yes. I have been engaged in the actual practice of law for more than six years, since September of 2010. I reside within the First Judicial District, in Santa Fe County, where I have resided continuously for more than three years. I am older than 35 years of age (45).

43. Please explain your reasons for applying for a judicial position and what factors you believe indicate that you are well suited for it.

Answer 43: I am applying to serve on the First Judicial District bench because I am eager to continue my public service on the bench, and because I believe I'm well suited to take over Judge Singleton's docket.

In my current position as an Assistant Attorney General, I have often been tested, and I believe those experiences have prepared me to continue by public service on the other side of the well. By being involved in high-stakes, and often acrimonious litigation, I have learned to depersonalize litigation disputes and conduct myself with an even temperament. I believe this approach will serve me well if I ascend to the bench and assume the role of a neutral arbiter.

I also believe that I have the practice chops to enable me to function effectively and fairly on the bench from day one. My practice involves myriad complex legal issues and often implicates difficult evidentiary questions. In my view, two of the most important parts of a trial court's job are making evidentiary rulings and deciding legal issues that arise in the course of litigation. These decisions must often be made in a trial or hearing setting, without the benefit of briefing or in-depth research. Because I have often been confronted with these issues during my tenure as a litigator, under pressure, I believe I will be able to capably navigate these aspects of serving on the trial court bench.

My experience in the appellate realm is also relevant to my application. Through my appellate work as a practitioner, I have come to understand how to create a record that positions my client for success on appeal. As a judicial clerk, I gained insight into the manner in which appellate courts analyze records and make decision. Together, these experiences will enable me to make rulings and create a record of the court's actions that will enable efficient appellate processes and diminish the likelihood of matters being remanded.

Finally, I am accustomed to a large workload, which I understand to be characteristic of the vacant division. In my current role at the Attorney General's Office, I am responsible for a large docket of complex matters. I do a great deal of briefing and frequently participate in hearings. I am accustomed to the ebb and flow of a litigation practice. Thus, I feel equal to the task of taking on a busy docket.

44. Does submission of this application express your willingness to accept judicial appointment to the First Judicial District Court if your name is chosen by the Governor?

Answer 44: Yes.

Items to be Submitted in Separate Document(s)

1. Please have **at least two, but not more than five**, letters of recommendation submitted directly to The Chair of the Judicial Selection Commission. Include letters from one or more professional adversaries. **If more than five letters are submitted, only the first five received will be submitted to the Commission.** Letters of recommendation may be scanned to be part of the application; however, **the original letters must be mailed directly from the source to the Judicial Selection Office.**
2. Please attach a list of no more than eight (8) references.
3. Please enclose **one** legal writing sample, such as a legal memorandum, opinion, or brief. If you had assistance from an associate, clerk or partner, indicate the extent of such assistance. Please submit no more than 20 pages.
4. You may also attach a copy of **one** other publication you have written which you feel would be relevant to the Commission's consideration of your qualifications. For this too, please submit no more than 20 pages. If you include more than one additional publication, only one will be presented for the Commission's review. The others will be retained on file with the rest of your application materials.
5. If you have, currently or in the past, suffered from any mental, physical or other condition that would affect your ability to perform the essential duties of a judge, and which has not been disclosed above, please describe the nature of such condition and your treatment and explain how it would affect your service. You may answer this request, as well as Questions 29 and 30, by submission of a separate confidential letter. If you wish the letter

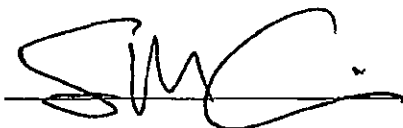
to remain confidential, please mark "CONFIDENTIAL" at the top of the first page of the letter. The information will be made available to each commissioner and otherwise hold the information confidential to the extent allowed by law.

[Instructions: All of the answers stated in this application must be affirmed as true under penalty of perjury, by self-affirmation.]

AFFIRMATION

The undersigned hereby affirms that he/she is the person whose signature appears herein on this application for judicial appointment; that he/she has read the same and is aware of the content thereof; that the information that the undersigned has provided herein is full and correct according to the best knowledge and belief of the undersigned; that he/she has conducted due diligence to investigate fully each fact stated above; that he/she executed the same freely and voluntarily; that he/she affirms the truth of all statements contained in this application under penalty of perjury; and that he/she understands that a false answer may warrant a referral to the Disciplinary Board or other appropriate authorities.

/s/:

A handwritten signature in black ink, appearing to be "S.M.C.", written over a horizontal line.

Date:

August 28, 2017

Sean M. Cunniff
936 Dunlap Street
Santa Fe, NM 87501
(505) 977-3877
scunniff@gmail.com

WRITING SAMPLE

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

STATE OF NEW MEXICO and the NEW MEXICO
ENVIRONMENT DEPARTMENT ex rel. NEW MEXICO
COST RECOVERY MANAGEMENT, LLC,

Plaintiffs,

v.

Case No. D-101-cv-2010-00917

EXXONMOBIL CORPORATION,
and its predecessor companies and subsidiaries,

Defendants.

**STATE'S RESPONSE TO JOINT MOTION FOR APPROVAL OF SETTLEMENT
AGREEMENT**

{1} THE STATE OF NEW MEXICO, by and through Attorney General Hector H. Balderas, hereby submits its response to New Mexico Environment Department and Defendant Exxon Mobil's Joint Motion for Approval of Settlement Agreement (the "Joint Motion"), filed with this Court on October 16, 2015. Exxon Mobil ("Exxon") and the Environment Department ("NMED") concurrently filed briefing papers with this Court addressing two distinct subjects, with NMED's brief addressing whether it is invested with the authority to unilaterally settle this litigation without authorization from the Attorney General; and Exxon's brief addressing whether the proposed settlement is "fair, adequate and reasonable," as defined in the New Mexico Fraud Against Taxpayers Act ("FATA").

INTRODUCTION AND SUMMARY OF ARGUMENT

{2} While the State objects to the settlement as failing to meet the "fair, adequate and reasonable" standard under FATA, this Response focuses on clarifying the longstanding principle (and predicate issue) that only the Attorney General – and his commissioned assistants

– are authorized to appear on behalf of the State of New Mexico and its agencies in court and bind the State to settlement. NMED’s position is undermined by its reliance on a singular flawed premise: that its regulatory authority as a state agency, which is undisputed, in some manner implicitly confers authority on NMED employees to represent the State of New Mexico in court, and bind the State in litigation. This flawed premise is squarely contravened by New Mexico statutory and case law. As set forth in this Response, it is long-settled that only an express or explicit legislative abrogation of the Attorney General’s exclusive authority operates to confer such authority upon another State actor. NMED has failed to identify any such express abrogation, undoubtedly due to the fact that none exists. As such, it is plain that NMED lacks the authority to enter into the proposed settlement with Exxon, and the Court should reject the relief sought in the Joint Motion.

ARGUMENT

I. UNDER NMSA 1978, SECTIONS 8-5-2, 36-1-19, AND 36-1-22, THE ATTORNEY GENERAL ENJOYS BROAD AND EXCLUSIVE AUTHORITY TO REPRESENT THE STATE OF NEW MEXICO AND ITS AGENCIES.

{3} As with all inquiries involving statutory interpretation, the starting point of analysis is with the plain language of the applicable statutes. In its brief, NMED gives short shrift to the multiple statutes plainly delineating the broad authority of the Attorney General with respect to the conduct of civil litigation involving the State. NMED focuses its attention on a singular clause in NMSA 1978, Section 8-5-2, which imparts absolute authority on the Attorney General, “[e]xcept as otherwise provided by law.” See NMED’s Brief in Support of Joint Motion for Approval of Settlement Agreement at 8 (Oct. 16, 2015) (“NMED’s Brief”). NMED employs a similarly narrow focus in attacking the broad grant of authority allocated to the Attorney General in Sections 36-1-19 and -22, by making the unsupported and dismissive contentions that those

provisions should be disregarded because (1) the “purpose” of those provisions is to “delineate responsibilities between the [d]istrict [a]ttorneys and the AG;” and (2) that the powers delegated in those sections merely authorize the Attorney General to act on behalf of the State, but not on behalf of individual state agencies. See NMED’s Brief at 9-10. NMED underscores its tenuous position by disregarding the authority that singularly prescribes the manner in which the Legislature has delegated authority to the Attorney General to appear on behalf of the State in court and control the course of litigation, to the exclusion of all others.

{4} The Attorney General’s authority in litigation begins and ends with the broad, if not plenary, grant of authority conferred by the Legislature in Section 8-5-2. That statute imparts broad mandatory powers upon the Attorney General to represent the State in Court – including in subsection 8-5-2(B), under which the Attorney General “shall...prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor.” Additionally, subsection 8-5-2(C) clarifies the role of the Attorney General vis-a-vis state agencies, and provides that the AG alone “shall...prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity.” Subsection 8-5-2(J) provides that the Attorney General “shall...appear before local, state and federal courts and regulatory officers, agencies and bodies, to represent and to be heard on behalf of the state when, in his judgment, the public interest of the state requires such action or when requested to do so by the governor.” Section 8-5-2’s enumeration of powers is exclusive to the Attorney General and his commissioned assistants, and authorizes no other lawyer to appear on behalf of the State.

{5} The exclusivity inherent in Section 8-5-2 is reflected and reinforced in NMSA 1978, Sections 36-1-19 and -22, which clearly delineate that it is the Attorney General (or district attorneys) who are solely authorized to enter into settlement agreements on behalf of the State and its myriad agencies. Originally enacted in 1909, Section 36-1-19(A) predates statehood, and extends an exclusive grant of authority analogous to Section 8-5-2, providing that:

[N]o one shall represent the state or any county thereof in any matter in which the state or county is interested except the attorney general, his legally appointed and qualified assistants or the district attorney or his legally appointed and qualified assistants and such associate counsel as may appear on order of the court, with the consent of the attorney general or district attorney.

Flowing from this broad authority to conduct litigation involving the State, Section 36-1-22, which was first enacted in the 1875-1876 session of the territorial legislature, delegates to the Attorney General and district attorneys (“DAs”) the express and exclusive “power to compromise and settle” any pending “civil proceedings.” In addition to this settlement authority, this same provision details the near absolute grant of authority to conduct and dispose of litigation as the Attorney General or DA sees fit. It authorizes the Attorney General to “grant a release or enter satisfaction in whole or in part, of any claim or judgment in the name of the state or county, or dismiss the same, or take any other steps or proceedings therein which to him may appear proper and right; and all such civil suits and proceedings *shall be entirely under the management and control of the said attorney general* or district attorneys, and all compromises, releases and satisfactions heretofore made or entered into by said officers are hereby confirmed and ratified.” § 36-1-22 (emphasis added).

{6} Despite NMED’s dismissive contention that Sections 36-1-19 and -22 merely serve to “delineate the responsibilities” between the Attorney General and DA, the plain language of those provisions in no manner indicates any such limiting intent or effect. Indeed, the language in both sections is unqualified, and nowhere in Chapter 36 does the Legislature declare an intent

to limit the applicability of the provisions contained therein. Case law is similarly decisive, as the Court of Appeals explained in City of Roswell v. Smith: “[t]he plain language of Section 36-1-19(A) explicitly prohibits unauthorized representation of the state or any county...in any matter in which the state or county is interested.” 2006-NMCA-040, ¶ 12, 139 N.M. 381 (internal quotation marks omitted). Case law is equally clear with respect to the meaning of the settlement and other authority prescribed in Section 36-1-22, as the Supreme Court held in Lyle v. Luna,

In the absence of *explicit* legislative expression to the contrary, the attorney general possesses entire dominion over every suit instituted by him in his official capacity whether there is a relator or not. As an incident of such control, the attorney general has power to dismiss or to discontinue suits brought by him either with or without a stipulation by the other party, and to make any dispositions of such suits that he deems best for the interest of the State.

1959-NMSC-042, ¶¶ 13, 23-24, 65 N.M. 429 (emphasis added); see also Cooper v. Otero, 1934-NMSC-008, ¶ 65, 38 N.M. 164 (“The Attorney General under the broad powers of his office, has the management and control of the suits and proceedings in which it is his duty to appear, and to take any steps or proceedings therein which to him may appear proper and right.”) (internal quotation marks omitted).

{7} NMED’s unsupported ancillary contention that Section 36-1-22 only authorizes the Attorney General to settle matters on behalf of the “State,” but not NMED as a “state agency,” erects an illusory and unsustainable distinction. Perhaps most compelling is that Section 36-1-22 makes no such distinction, and certainly does not in any manner deviate from the exclusive grant of authority to the Attorney General or DAs of New Mexico explained above. Indeed, NMED cites no basis for this court to conclude that the Legislature has splintered the exclusive authority under Section 36-1-22 in a manner that supports NMED’s attempts to manufacture special “agency” settlement authority. To the extent that Section 36-1-22 is not entirely conclusive in

the matter, Section 8-5-2(C) makes clear that the Attorney General is not limited to exclusive representation of the State *qua* State: but rather is *obligated* to “prosecute and defend all actions and proceedings brought by or against any state officer or head of a state department, board or commission, or any employee of the state in his official capacity.”

{8} All of the foregoing authority merely affirms the longstanding and uncontroverted principle that the Attorney General operates as the exclusive “attorney for the State of New Mexico.” See State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc., 1973-NMSC-087, ¶ 5, 85 N.M. 521. Despite NMED’s attempt to minimize the import of the Attorney General’s authority because his duties are statutory and not enumerated in the Constitution, see NMED’s Brief at 8, the Supreme Court has made clear that

[a]s a constitutional office with broad statutory powers, including all powers reasonably and necessarily implied therefrom, the Attorney General has the responsibility and the power to represent the interests of the State and its officials in all litigation before state and federal courts, and to manage and control said litigation, unless otherwise provided by law.

State ex rel. Madrid v. Turner, No. 26,035, slip op. at 2 (N.M. Sup. Ct. Dec. 14, 1999) (attached hereto as “Exhibit A.”) At issue in Turner was the power of the State’s Natural Resources Trustee to manage litigation in which it had been named. The Court ultimately held that any “litigation-related actions” taken by the Trustee “must necessarily be done with the concurrence of the Attorney General; otherwise they are not enforceable against the State.” Id. Attempts to curtail the Attorney General’s dominion over litigation threaten to fundamentally undermine his role as an independently elected executive official.

II. THE STATUTES NMED RELIES UPON CONTAIN NO PROVISION WHICH ABROGATES THE ATTORNEY GENERAL’S BROAD AND EXCLUSIVE AUTHORITY OVER LITIGATION INVOLVING THE STATE OR ITS MYRIAD AGENCIES.

{9} In an attempt to downplay this overwhelming and uncontroverted grant of authority to the Attorney General, NMED points to the language in Section 8-5-2 which limits the Attorney General’s authority only when “otherwise provided by law.” See NMED Brief at 8. NMED then cites to its grant of regulatory authority under various statutes to justify its view that the Legislature has carved out exceptions pursuant to Section 8-5-2. While the Attorney General readily concedes that NMED has extensive regulatory duties under New Mexico law, these regulatory powers in no manner contravene the express and broad grant of authority extended the Attorney General to represent the State – including NMED – in the courts of New Mexico. Instead, NMED conflates its regulatory powers – which authorize taking court action as a mode of regulatory enforcement– to *implicitly* confer authority that has been explicitly granted to the Attorney General. However, because the Legislature has not in any manner expressly abrogated the Attorney General’s general grant of broad and exclusive authority to appear in court and conduct litigation on behalf of the State and its agencies, NMED’s argument fails.

{10} NMED relies on three statutes to support its position: the Groundwater Protection Act (the “GWPA”), the Environmental Improvement Act (the “EIA”), and its enabling statute, the Department of Environment Act (the “DOEA”). See NMED Brief at 3-7. While it is true that each one of these statutory sections direct the NMED to utilize the courts as a regulatory enforcement mechanism as needed, none of these authorize the NMED to appear in the courts of New Mexico or empower NMED to settle or dispose of litigation. Indeed, the DOEA does not so much as authorize NMED to hire a single attorney, in stark contrast to Section 8-5-5, which expressly authorizes the Attorney General to hire assistants who are authorized to appear in court

for the State and its agencies. The DOEA – and the other statutes cited – merely indicate that NMED enjoys judicial recourse to enforce its regulatory jurisdiction, much like any number of State regulatory agencies. See, e.g., NMSA 1978, § 9-17-5(B)(5) (authorizing the secretary of the General Services Department to take “appropriate administrative action or action in the courts”); NMSA 1978, § 9-21-6(B)(5) (authorizing the secretary of the Indian Affairs Department to take “appropriate administrative action or action in the courts”); NMSA 1978, § 9-4A-6(B)(5) (authorizing the secretary of the Cultural Affairs Department to take “appropriate administrative action or action in the courts”). Each of the provisions cited by NMED leave in place the authority conferred upon the Attorney General in Chapters 8 and 36 of the New Mexico Statutes to actually appear in Court to prosecute (and resolve) litigation involving the State or its various agencies and subdivisions.

{11} NMED further relies on two inapposite New Mexico Supreme Court cases and an official Attorney General Opinion to bolster its position that its regulatory authority somehow implicitly trumps the express grant of authority to the Attorney General under Section 8-5-2. Fatal to this reliance is the plain fact that none of these authorities addresses the interplay between NMED’s regulatory authority and the Attorney General’s broad and exclusive grants of authority in Sections 8-5-2 and 36-1-19 and -22. In State ex rel. Norvell v. Arizona Public Service Company, 1973-NMSC-051, 85 N.M. 165, the legal question involved a jurisdictional dispute between the Court and NMED – namely, whether the Court was permitted to exercise its jurisdiction over a pollution control matter which happened to be brought by the Attorney General, versus allowing the matter to proceed in an administrative proceeding pending before NMED’s predecessor, the Environmental Improvement Division (“EID”). See Norvell, 1973-NMSC-051, ¶ 31 (“We see the problem before us as...one of coordination between the judicial and administrative arms of

government”). The second case cited, Environmental Improvement Division v. Aguayo, 1983-NMSC-027, 99 N.M. 497, merely echoes language in EID’s enabling statute which clarifies that it may litigate to vindicate its regulatory authority. See Id., 1983-NMSC-027, ¶ 11. Much like Aguayo, the Attorney General Opinion, which merely addresses whether EID “is an environmental regulatory and enforcement agency,” does little more than enumerate the various (undisputed) *regulatory* powers conferred upon the agency through various legislative enactments. See Atty. Gen. Op. 87-22 (May 29, 1987). Neither case nor the Attorney General Opinion addresses the matter which is the linchpin of this dispute: namely, whether there exists any basis to abrogate the Attorney General’s authority under Section 8-5-2. Indeed, none of these so much as mention Sections 8-5-2, 36-1-19 or -22.

{12} In the event the Legislature does intend to restrict the Attorney General’s exclusive authority under Section 8-5-2, it must do so explicitly. See State v. Block, 2011-NMCA-101, ¶ 19, 150 N.M. 598 (requiring “express” language to trigger “otherwise provided by law” language in Section 8-5-2); See generally State ex rel. New Mexico Judicial Standards Comm’n v. Espinosa, 2003-NMSC-017, ¶ 54, 134 N.M. 59 (requiring “express” language to trigger an “otherwise provided by law” provision). In State v. Block, the Court of Appeals interpreted the “otherwise provided by law” language in Section 8-5-2, considering whether the Attorney General was barred from exercising his prosecutorial authority in a case arising under an alleged violation of the Voter Action Act, NMSA 1978, Sections 1-19A-1 to -17 (the “VAA”). The defendant challenged the Attorney General’s prosecution of a VAA violation by relying on a limitation in Section 1-19A-17(A) which provides that the Secretary of State, upon determining there has been a violation of the VAA, “shall impose a fine or transmit the finding to the attorney general for prosecution.” See id., ¶¶ 11, 16. The court rejected the argument that this provision

constituted a limitation “as otherwise provided by law” of the Attorney General’s “broad authority” under Section 8-5-2. See id., ¶¶ 11, 23. It concluded that because there was “no express language in Section 1-19A-17 or elsewhere in the Act specifying the nature or any limit on the Attorney General’s authority to initiate criminal prosecutions for violations of the Act,” the limiting language in Section 8-5-2 was inapplicable. See id., ¶ 23. The court further noted that “had the Legislature intended for the Act to ‘otherwise provide’ a limitation on the Attorney General’s authority under Section 8-5-2, it could have included such language in the Act.” Id., ¶ 19. This failure to expressly abrogate the Attorney General’s authority under Section 8-5-2 was fatal to the defendant’s argument. The effect in these proceedings is even more pronounced. Unlike in Block, the statutory language relied on by NMED in these proceedings does not so much as *imply* a potential limitation on the Attorney General’s authority under Section 8-5-2. Simply making reference to judicial enforcement, as is the case in the EIA, DOEA, and GWPA statutes, does not even approach the “express” statement from the Legislature required to limit the Attorney General’s authority under Section 8-5-2.

{13} Against this backdrop, the Legislature has demonstrated its capacity to expressly delegate the Attorney General’s otherwise exclusive authority to represent the State and its agencies in Court. For example, in the Tort Claims Act, NMSA 1978, Sections 44-4-1 to -27, the Risk Management Division of the General Services Department is authorized to represent State agencies and their employees in tort liability cases arising out of action taken within the scope of those agencies’ and employees’ duties. Specifically, NMSA 1978, Section 41-4-23(B)(5) provides, in relevant part, that

Money deposited in the public liability fund may be expended by the risk management division of the general services department: . . . to contract with one or more attorneys or law firms on a per-hour basis, or with the attorney general, to defend tort liability claims against governmental entities and public employees

acting within the scope of their duties.

{14} Even this express grant of authority is not without its limits. First, it is not exclusive of the Attorney General's authority to represent State agencies and employees in tort claims. Second, it is strictly limited to such claims. The Risk Management Division does not, for example, have any authority to provide a defense of a State agency or employee sued in his or her official capacity in a lawsuit challenging the constitutionality of a New Mexico statute. The Attorney General could specially commission an attorney, including one that has a contract with the Risk Management Division, to defend such a lawsuit, but that attorney would then be exercising the delegated authority of the Attorney General, not the Risk Management Division.

{15} Section 41-4-23(B)(5) illustrates what actually qualifies as an express abrogation (or sharing) of the Attorney General's authority. There is no such express limitation in any of the statutes cited by NMED.

REQUEST FOR RELIEF

{16} For all of the foregoing reasons, the Attorney General respectfully requests that the Joint Motion be denied in its entirety.

Dated: October 30, 2015

Respectfully submitted,

HECTOR H. BALDERAS,
Attorney General of New Mexico

By /s/ Sean Cunniff
Sean Cunniff
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6920
(505) 827-5826 (Fax)
scunniff@nmag.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 2015, I filed and served the foregoing electronically through the Odyssey Electronic Filing System, which caused all parties of record to be served by electronic means.

/s/ Sean Cunniff
Sean Cunniff
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504
(505) 827-6920
(505) 827-5826 (Fax)
sunniff@nmag.gov

Sean M. Cunniff
936 Dunlap Street
Santa Fe, NM 87501
(505) 977-3877
scunniff@gmail.com

REFERENCES

1. Current supervisor at the Attorney General's Office:
Regina Ryanzcak
Director of Litigation
Assistant Attorney General
Office of the Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 490-4053
rryanczak@nmag.gov
2. Past supervisor at the Attorney General's Office:
Scott Fuqua
Fuqua Law & Policy, PC
Post Office Box 32015
Santa Fe, NM 87594
(505) 982-0961
scott@fuqualawpolicy.com
3. Past supervisor at the Attorney General's Office:
Mark Reynolds
Clerk of the Court
New Mexico Court of Appeals
P.O. Box 2008
Santa Fe, NM 87504
coamhr@nmcourts.gov
(505) 827-4925
4. My current assistant/paralegal:
Marcie Maestas
Paralegal and Administrative Assistant
State of New Mexico
Office of the Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 490-4880
mmaestas@nmag.gov

5. Supervisor at the New Mexico Supreme Court:

Edward L. Chavez

Justice

New Mexico Supreme Court

P.O. Box 848

Santa Fe, NM 87504

(505) 827-4880

supelc@nmcourts.gov

6. Opposing counsel:

Andrew G. Schultz

Director

Rodey, Dickason, Sloan, Akin, & Robb, P.A.

201 3rd Street NW, Suite 2200

Albuquerque, NM 87102

(505) 768-7205

aschultz@rodey.com

7. Client:

Evan Land

General Counsel

State Investment Office

State of New Mexico

41 Plaza La Prensa

Santa Fe, NM 87507

(505) 235-0451

evanl.land@state.nm.us

8. Co-counsel:

Robert D. Kidd

Compliance Manager

County of Bernalillo

415 Tijeras, NW

Albuquerque, NM 87102

(505) 468-1381

rkidd@bernco.gov